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IN THE

Supreme Court of the United States

October Term, 1969

No. [redacted] 153

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON,

Appellants,

vs.

ROBERT H. FINCH, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,

Appellees.

On Appeal from a Three-Judge United States District Court for the District of Connecticut

JURISDICTIONAL STATEMENT

LEO PFEFFER
15 East 84th Street
New York, New York 10028

PETER L. COSTAS
111 Pearl Street
Hartford, Connecticut 06103

Attorneys for Appellants

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IN THE

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JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of a three-judge court of the United States District Court for the District of Connecticut dismissing the complaint herein.

Appellants brought this action to enjoin the United States Secretary of Health, Education and Welfare and the United States Commissioner of Education from using Federal funds to finance the construction of facilities at sectarian educational institutions purportedly pursuant to Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. §§701-58 (1964), and for judgment declaring that such use is not authorized by the statute or, in the alternative, if authorized, is unconstitutional under the First Amendment of the United States Constitution. Joined as defendants are the chairman of the Commission on Aid to Higher Education of the State of Connecticut and four sectarian colleges in Connecticut whose applications for funds under the Act have been approved by him as well as the other defendants, as required by the Act.

After a five-day trial at which some 155 documentary exhibits were introduced into evidence and the testimony of 22 witnesses were taken, the District Court issued a judgment dismissing the complaint on the merits.

Opinion Below

The opinion of the District Court is as yet unreported. It is printed in Appendix A (pp. 13-30) of this Statement. The District Court's Findings of Fact and Conclusions of Law are printed in Appendix B (pp. 31-43).

Jurisdiction

The judgment of the District Court was issued and filed on March 19, 1970. The appellants herein filed their notice of appeal in the District Court on April 8, 1970. This appeal is taken pursuant to Title 28 of the United States Code, Section 1253. *Briggs* v. *Elliott*, 342 U. S. 350 (1952); *Flast* v. *Cohen*, 392 U.S. 83 (1968).

Statute Involved

The statutory provision involved in this suit is Title I of the Higher Education Facilities Act of 1963. It is printed in Appendix C of this Statement (pp. 44-58).

The Questions Presented

Two questions are presented by this appeal:

(1) Does Title I of the Higher Education Facilities Act of 1963 authorize the expenditure of Federal funds to finance the construction of facilities at educational institutions controlled by religious groups and organized for and engaged in the propagation and promotion of the doctrine, teachings and practices of particular religions so long as the particular facilities so financed will not be used for sectarian instruction or as a place for religious worship or primarily in connection with any part of the program of a school or department of divinity?

(2) If the Act does authorize such expenditure is it to that extent violative of the provisions of the First Amend-

ment to the Federal Constitution forbidding laws respecting an establishment of religion and prohibiting the free exercise thereof?

Statement of the Case

This action was brought by a group of individuals, citizens and taxpayers of the United States and residents of the State of Connecticut challenging the validity of certain expenditures, made by the Department of Health, Education and Welfare, for the construction of facilities at four church-controlled colleges in Connecticut. The complaint alleged that these institutions, joined as defendants to the action, were controlled and conducted by religious orders and the Roman Catholic Diocese of Bridgeport, and that they were organized for and, at the time when the specific grants to them were authorized by the Commissioner of Education, were engaged in the propagation and promotion of the doctrine, teachings and practices of the Roman Catholic religion. The complaint further alleged that such expenditures were not authorized by Title I of the Higher Education Facilities Act of 1963 or, in the alternative, that the Act was to that extent unconstitutional.

At the trial, considerable evidence was offered to support the factual allegations. Conversely, the institutional defendants offered considerable evidence in contradiction thereto. In addition, they offered uncontradicted (and to some extent uncontradictable) evidence that the specific facilities for which the expenditures were authorized had not and would not in the future be used for sectarian instruction or religious worship.

The District Court did not decide the contested factual issues. It held, first, that Congress had indeed intended to authorize expenditures for the construction of facilities at church-controlled educational institutions no matter what the purpose of their organization and the nature of their operations so long as the specific Federally financed facilities were not used for sectarian instruction or worship. It held, second, that the statute so construed was constitutional.

The Questions Presented Are Substantial

There can be little doubt that the questions presented upon this appeal are of national importance. Primarily, they involve the interpretation of an important national law, the Higher Education Facilities Act of 1963, and the constitutionality of that law if it is interpreted to authorize governmental financing of construction of facilities at educational institutions organized for and engaged in propagating and promoting religion. Concurrently, they involve the broader question of the meaning of the Establishment Clause in respect to the direct financing of religious educational institutions out of tax-raised funds.

These are questions which only this Court can answer authoritatively. Determination by this Court is particularly necessary in view of the contrary views expressed by lower courts on the question of constitutionality. Compare the decision of the court below with *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 A. 2d 51, cert. denied, appeal dismissed 385 U. S. 97 (1966).

Nor can there be any doubt that the questions presented in this appeal are substantial. On the question of interpretation, the court below relied upon statements made during the course of debate by the sponsors and floor managers of the legislation that the benefits of the Act were to be available to church-related colleges and universities, and upon the defeat of an amendment which would have disqualified such institutions from receiving benefits under the Act (*infra*, p. 19). But giving full probative value to statements made during floor debates (rather than in the formal reports of the committees reporting out the measure for consideration and adoption by the Congress) and to whatever reasonable inferences can be drawn for the rejection of a particular amendment, the question of interpretation presented in this appeal remains substantial.

It is a far cry from an unwillingness by Congress to exclude all church-related institutions to a willingness to include them all, no matter how deep and extensive is their commitment to the propagation and practice of particular religions. We did not contend in the court below nor do we contend here that all church related colleges and universities, no matter how tenuous the relationship, are excluded from the benefits of the Act. On the contrary, the entire thrust of our trial evidence was to show the extent and intensity of religious teachings and practices in the four institutions joined as defendants, none of which denied that they were church-related. Moreover, we placed considerable reliance on the *Horace Mann League* decision, in which the Maryland Court of Appeals ruled that one of the four colleges whose grants were challenged was constitutionally

eligible to receive state funds although it was concededly church-related.*

Notwithstanding the statements made during floor debates and the rejection of an amendment excluding church-related institutions, the fact remains that Congress could have easily stated expressly that all sectarian colleges (other than theological seminaries) irrespective of other factors were eligible to receive the benefits of the Act. In the absence of such a statement of legislative intent there is wide room for application of the well-established principle that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but grave doubts upon that score." *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916). See also *United States* v. *Rumely*, 345 U. S. 41 (1953); *Kent* v. *Dulles*, 357 U. S. 116 (1958).

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* In our Post-Trial brief to the court below, we stated (pp. 5-6):

* * * We do not contend that any relationship between an institution and a church disqualifies the former from receiving governmental funds. In the *Horace Mann League* case, four colleges, all church related, were involved. Nevertheless, the Maryland court held that one of them, Hood College, was constitutionally eligible to receive state funds. Church relationship, the court held, is one factor, but only one to be considered and weighed in determining constitutional eligibility. Church relationship, moreover, is not fungible. In some cases it may be so close as to amount to complete church control; in others it may be no more than a sentimental vestige of a relationship which has long ceased to have practical significance.

If church relationship is not of itself determinative, what is? In *Everson*, the Court stated that government funds may not be used to support any institution that teaches or practices religion. Taken literally, this could mean that a college which employs a chaplain is disqualified for under the law of agency his practice of religion is that of his principal, the college.

We make no such claim. We assert rather that under the Establishment Clause an institution is barred from receiving governmental funds if the teaching or practice of religion is a meaningful and substantial part of its existence.

On the substantive constitutional issue, the court below placed its major if not sole reliance upon *Board of Education* v. *Allen*, 392 U.S. 236 (1968). There this Court, in upholding a statute authorizing the loan of secular textbooks to children, applied the test, enunciated in *Abington School District* v. *Schempp*, 374 U.S. 203, 222 (1963), that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and primary effect that neither advances nor inhibits religion."

Applying that test to the present case, the court below found that the statute meets the first requirement of a legislative secular purpose in that it "contains a declaration that the policy underlying the Act is to increase the student enrollment capacity of the Nation's institutions of higher education through grants for construction of academic facilities to help provide young people with the greatest possible opportunity for higher education; and such declaration is based on congressional findings that there is an urgent need for construction of such facilities to enable these institutions to accommodate anticipated increases in student enrollments" (*infra*, p. 24). The court below held also that the Act meets the second requirement of a primary effect that neither advances nor inhibits religion, since the Act specifically requires that the facilities financed with Federal funds shall not be used for religious instruction or worship (*infra*, pp. 26-27).

The court below acknowledged that, in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), this Court stated (at p. 16):

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever form they may adopt to teach or practice religion.

It acknowledged too, that "this language, read in isolation, might suggest thta the Establishment Clause renders impermissible any governmental aid to church related educational institutions" (*infra*, p. 22). However, it viewed the language merely as dicta and implied, without quite saying so explicitly, that in any event it has been superseded by the purpose-effect test.

It is our contention that nothing this Court has said or done can be construed as expressing an intention to repudiate or abandon the principle, the roots of which go back even before the adoption of the First Amendment, but which received its modern expression in *Everson*, that government may not finance institutions which teach or practice religion. In the *Allen* case, this Court specifically quoted the statement from *Everson* that the Establishment Clause bars any "tax in any amount, large or small • • • levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" (392 U.S. at 242). The Court stated further (at 243-4):

> • • • The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically in the State. *Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.* Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution. (Emphasis added.)

We contend further that, even if the purpose and effect test is used, the result should be the same since a grant of governmental funds to an educational institution organized for the purpose and actively and intensively engaged in the propagation of a particular religion cannot but have the purpose and certainly the effect of advancing religion. Under either theory, it is our contention that it is constitutionally immaterial that the funds are earmarked for the construction of a particular college facility which will not be used for the teaching or practice of religion.

The court below noted that the purpose of the Act is to increase attendance at institutions of higher education. But if an institution organized for the primary purpose of propagating and advancing religion finds it necessary in order to achieve that purpose to provide the students also with secular instruction, can it be gainsaid that a law whose purpose is to increase attendance at such an institution has the purpose of advancing religion? Can it be gainsaid that the primary effect of such a law is to advance religion?

What the court below has held is that it matters not what the institution does generally but only what it does with the specific facility to which it earmarks governmental funds. In other words, an institution which admits only students of a particular religion, requires them to participate in religious activities, compels them to comply with the doctrines and dogmas of the religion, forces them to attend church, requires them under penalty of dismissal to take instruction in the theology and doctrines of the religion, and does everything to propagate and advance a particular

religion other than confer degrees in divinity, can constitutionally receive governmental funds so long as in its bookkeeping it allocates these funds to the construction of a chemistry laboratory or gymnasium.

If the Establishment Clause now allows this then we suggest it has become little more than dead letter.

Conclusion

The Federal questions presented by this appeal are substantial and of national importance. It is therefore respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

LEO PFEFFER
PETER L. COSTAS
Attorneys for Appellants

April, 1970

Appendix A

UNITED STATES DISTRICT COURT

District of Connecticut

Civil No. 12,767

Eleanor Taft Tilton, Mildred H. Clark, Carol D. Goldstone, Theodore Gurney, Harvey L. Raisner, Elisabeth R. Swain, Wyman W. Parker, Paul A. Reynolds, Rufus Blanshard, Jay S. Roth, Carl W. Schaefer, Norman T. David, Herbert T. Goldstone, James W. Gardner, Jr., Charles L. Pendleton,

Plaintiffs,

vs.

Robert H. Finch, Secretary of the United States Department of Health, Education and Welfare, James E. Allen, Jr., Commissioner of Education of the United States, Marvin K. Peterson, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, Sacred Heart University, Annhurst College, Fairfield University, Albertus Magnus College,

Defendants.

Before J. Joseph Smith, Circuit Judge, and Timbers and Blumenfeld, District Judges.

Taxpayers suit seeking declaratory and injunctive relief on the ground that their constitutional rights are impaired by the Higher Education Facilities Act of 1963, 20 U.S.C.

§§701-58 (1964), and by grants thereunder to defendant church related colleges and universities for construction of academic facilities. Judgment for defendants.

Leo Pfeffer, New York, N.Y., Peter L. Costas, Melvin S. Katz, Paul W. Orth, Robert Smith, Hartford, Conn., and Jerry Wagner, Bloomfield, Conn., *for plaintiffs.*

Jeffrey F. Axelrad, Atty., William D. Ruckelhaus, Asst. Atty. Gen., Harland F. Leathers, Atty., Dept. of Justice, Wash. D.C., Stewart H. Jones, U.S. Atty., and F. Mac Buckley, Asst. U.S. Atty., Hartford, Conn., *for defendants Robert H. Finch and James E. Allen, Jr.*

F. Michael Ahern, Asst. Atty. Gen., and Robert K. Killian, Atty. Gen., State of Connecticut, Hartford, Conn., *for defendant Marvin K. Peterson.*

Edward Bennett Williams, Jeremiah C. Collins and Charles H. Wilson, Jr., of Williams & Connolly, Wash. D.C., *for all defendant colleges and universities.*

James J. O'Connell, of Coles, O'Connell & Dolan, Bridgeport, Conn., *for defendant Sacred Heart University.*

Howard T. Owens, of Owens & Schine, Bridgeport, Conn., *for defendants Annhurst College and Fairfield University.*

Donald F. Keefe, Lawrence W. Iannotti and Bruce Lewellyn, of Tyler, Cooper, Grant, Bowerman & Keefe, New Haven, Conn., *for defendant Albertus Magnus College.*

TIMBERS, District Judge:

QUESTIONS PRESENTED

This taxpayers suit seeking declaratory and injunctive relief with respect to the Higher Education Facilities Act of 1963, 20 U.S.C. §§701-58 (1964) (the Act), presents the following essential questions:

(1) Whether the Act authorizes grants to defendant church related colleges and universities for construction of academic facilities.

(2) If so, whether the Act and grants thereunder impair plaintiffs' rights under the establishment clause or the free exercise clause of the First Amendment of the Constitution of the United States.

For the reasons stated below, we hold that the Act does authorize the grants in question and that neither the Act nor the grants thereunder impair plaintiffs' constitutional rights in the respects claimed.[1] Judgment therefore must be entered for defendants dismissing the complaint.

PARTIES TO THE ACTION

Plaintiffs are fifteen residents and citizens of the United States and of Connecticut. They are federal taxpayers suing for themselves and others similarly situated. As taxpayers they have standing to sue. *Flast* v. *Cohen*, 392 U.S.

1. Plaintiffs assert a further claim that, to the extent that funds are granted under the Act to "sectarian" institutions, to that extent "non-sectarian" institutions are deprived of such funds and are discriminated against, in violation of the First and Fourteenth Amendments. We also reject this claim as lacking merit. The eligibility of an institution for grants under the Act does not depend upon its relation to any organized religion.

83, 88-91 (1967); see *Association of Data Processing Service Organizations, Inc.* v. *Camp*, —— U.S. ——, 38 U.S.L.W. 4193 (U.S. March 3, 1970), and *Barlow* v. *Collins*, —— U.S. ——, 38 U.S.L.W. 4195 (U.S. March 3, 1970).

Defendant government officials are the Secretary of the Department of Health, Education and Welfare of the United States, the Commissioner of Education for the United States, and the Chairman of the Connecticut Commission on Aid to Higher Education; they are sued in their official capacities, particularly with respect to their duties in the administration of the Act. Defendant colleges and universities are Sacred Heart University, Annhurst College, Fairfield University and Albertus Magnus College, four church related Connecticut colleges and universities;[2] they are sued as recipients under the Act of grants for the construction of various academic facilities.

CLAIMS OF THE PARTIES

Plaintiffs claim that the Act does not authorize grants to defendant colleges and universities for construction of academic facilities; and, if the Act does authorize such grants, the Act and grants violate the establishment clause and the free exercise clause of the First Amendment. Accordingly, plaintiffs seek (i) a declaratory judgment that

2. The amended complaint alleges that each of the four defendant institutions are "organized for and engaged in the propagation and promotion of the doctrine, teachings and practices of the Roman Catholic religion"; that three of the institutions, Annhurst College, Fairfield University and Albertus Magnus College, are "organized, conducted and controlled" by religious orders; and that the fourth, Sacred Heart University, is "organized, conducted and controlled" by the Diocese of Bridgeport of the Roman Catholic Church. Amended complaint, ¶¶12-16.

the determinations and actions of defendant government officials in allocating federal funds to defendant colleges and universities for construction of academic facilities are not authorized by the Act, or, in the alternative, if the Act authorizes such grants, a declaratory judgment that the Act to that extent is unconstitutional and the grants are void; (ii) injunctive relief enjoining defendant government officials from recommending and approving any program for the expenditure of federal funds to finance in whole or in part construction of academic facilities in "sectarian educational institutions" and enjoining defendant colleges and universities from receiving any more funds already awarded under the Act; and (iii) such further relief as may be just and proper.

Defendants' position is that the grants received by defendant colleges and universities are authorized by the Act and that the Act and grants do not impair plaintiffs' constitutional rights.

JURISDICTION

This Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §1331(a) (1964).

Since the action seeks injunctive relief with respect to an Act of Congress on the ground of repugnance to the Constitution of the United States, a special statutory district court of three judges were convened to hear and determine the action pursuant to 28 U.S.C. §§2282 and 2284 (1964).

HEARINGS AND RECORD

The pleadings having been closed, the Court held a five day hearing at Hartford on the merits.

The record before the Court consists of the pleadings; facts established by stipulation; some 155 documentary exhibits; and the testimony of 22 witnesses.

Counsel for the respective parties have been fully heard in oral argument; and they have submitted helpful briefs, together with proposed findings of fact and conclusions of law.

CLAIM THAT ACT DOES NOT AUTHORIZE GRANTS TO DEFENDANT COLLEGES AND UNIVERSITIES

The threshold question is whether the Act authorizes grants to defendant colleges and universities for construction of academic facilities, plaintiffs' initial claim being that Congress did not intend to make church related institutions of higher education eligible for grants under the Act.

The Act by its terms neither includes nor excludes church related institutions as such; it simply authorizes grants to "institutions of higher education"[3] of federal funds for construction of academic facilities.

The Act, however, defines an "institution of higher education"—without regard to whether it is church related or not—as an institution which is nonprofit, accredited and legally authorized by the state in which it is located to pro-

3. 20 U.S.C. §§711, 716 (1964).

vide a program of education beyond high school.[4] Since church related colleges and universities may meet these criteria, they may be eligible for grants under the Act.

Moreover, the Act forbids grants for construction of "any facility used or to be used for sectarian instruction or as a place for religious worship" or "any facility which • • • is used or to be used primarily in connection with any part of the program of a school or department of divinity".[5] These limitations in the Act itself make it plain that grants for construction of academic facilities to be used in connection with other functions of church related colleges and universities were contemplated.

Indeed the legislative history is quite conclusive that Congress intended to make the benefits of the Act available to church related colleges and universities.[6] Not only did the sponsors and floor managers of the legislation so state in the debate,[7] but amendments to deny the benefits of the Act to such institutions were voted down.[8]

As to whether the Act authorizes the instant grants to defendant colleges and universities, we hold on the basis of the entire record before the Court that defendant government officials clearly acted in accordance with the provi-

4. 20 U.S.C. §751(f) (1964).

5. 20 U.S.C. §751(a)(2) (1964).

6. For the legislative history of the Act, *see generally* 1963 U.S. Code Cong. and Adm. News, pp. 1172-1202.

7. 109 Cong. Rec. 14150-51 (1963) (Remarks of Representative Powell); *id.* at 14159 (Remarks of Representative Quie); *id.* at 18409-12 (Remarks of Senator Prouty); *id.* at 19427-30 (Remarks of Senator Morse).

8. 109 Cong. Rec. 19492-96 (1963).

sions of the Act and within the scope of their authority in recommending and approving the grants in question.[9]

Having held that the Act authorizes the grants to defendant colleges and universities for construction of academic facilities, we turn now to plaintiffs' claims that the Act and the grants thereunder impair their constitutional rights.

ESTABLISHMENT CLAUSE CLAIM

Plaintiffs' primary claim challenging the constitutionality of the Act and the grants is that they violate the establishment clause of the First Amendment which provides that "Congress shall make no law respecting an establishment of religion. * * *"[10] Plaintiffs assert that federal aid in the form of construction grants to private church related educational institutions constitutes government aid to religion.

The Supreme Court has not ruled on the precise issue here presented, although it has examined the scope and meaning of the establishment clause in several decisions. Only in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and *Board of Education* v. *Allen*, 392 U.S. 236 (1968), how-

9. Reference is made to the Court's separate Findings of Fact filed herewith for a more detailed statement of the nature and purpose of the grants here involved and the manner in which the applications for such grants have been processed by defendant government officials.

10. More specifically, plaintiffs allege as the first count in their amended complaint that the determinations and actions of defendants "effect a contribution of tax-raised funds to the support of institutions which teach the tenets of a church and constitute governmental financing of religious groups and government action whose purpose and primary effect is to advance religion" in violation of the establishment clause. Amended complaint, ¶29.

ever, has the Supreme Court touched upon the establishment clause validity of government aid to private church related education.[11]

Everson involved an establishment clause challenge to a New Jersey statute which provided state reimbursement to parents of parochial school children as well as to parents of public school children for the cost of bus transportation to and from school. The Supreme Court held that the statute did not violate the establishment clause. In the course of its opinion, the Court stated:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, what-

11. There are pending a number of recent cases involving challenges under the establishment clause of the First Amendment, made applicable to the states by the Fourteenth Amendment, with respect to the validity of state statutes which authorize use of state funds to aid church related education. See, e.g., *Opinion Of The Justices,* —— Me. ——, —— A.2d —— (1970), slip opinion January 15, 1970 (proposed Maine Nonpublic Elementary Education Assistance Act of 1970, authorizing purchase of secular educational services from nonpublic schools, *held* (4-2), to violate establishment clause); *Lemon* v. *Kurtzman,* —— F.Supp. —— (E.D.Pa. 1969), slip opinion November 28, 1969 (Pennsylvania Nonpublic Elementary and Secondary Education Act of 1969, authorizing payment of state funds to nonpublic elementary and secondary schools as reimbursement for teaching certain secular subjects, *held* by a three-judge district court (2-1), not to violate establishment clause); *Vermont Educational Buildings Financing Agency* v. *Mann,* 127 Vt. 262, 247 A.2d 68 (1968), *prob. juris. noted,* 37 U.S.L.W. 3379 (U.S. April 18, 1969); *juris. postponed,* 38 U.S.L.W. 3017 (U.S. July 1, 1969) (Vermont Educational Building Financing Act of 1966, authorizing leasing and subleasing agreements between state agency and church related college for construction of classroom and science building, *held* (4-1), not to violate establishment clause); *Connecticut Civil Liberties Union* v *Sanders,* Civil No. 13432 (D. Conn., complaint filed September 30, 1969, action pending before three-judge district court) (Connecticut Act Concerning Assistance To Nonpublic Schools For Secular Education of 1969, authorizing Secretary of State Board of Education to purchase from nonpublic schools secular educational services for students, challenged, *inter alia,* as violative of establishment clause).

> ever they be called, or whatever form they may adopt to teach or practice religion." 330 U.S. at 16.

Although this language, read in isolation, might suggest that the establishment clause renders impermissible any government aid to church related educational institutions, such suggestion is dispelled by the Court's actual decision sustaining the statute. The Court so held even though it recognized that parochial schools received some benefit from state subsidization of bus transportation for parochial school children. 330 U.S. at 17. The Court noted that a state could not exclude individuals *"because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." (Emphasis that of the Court) 330 U.S. at 16. Since it viewed state subsidization of bus transportation as a public welfare measure in the same category as such general government services relating to schools as police and fire protection, sewage disposal, public highways and sidewalks, it concluded that the challenged statute did not violate the establishment clause. 330 U.S. at 17-18.

Allen, the most recent Supreme Court decision dealing with government aid to church related education, involved an establishment clause challenge to a New York statute authorizing the state to loan secular school textbooks to parochial school students. In determining the validity of the challenged statute, the Court utilized the secular purpose and primary effect test under which "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 392 U.S. at 243, quoting from *Abington School District* v. *Schempp,* 374

U.S. 203, 222 (1963), where the secular purpose and primary effect test was first enunciated. Applying this test in *Allen*, the Court upheld the statute on the ground that its stated legislative purpose clearly was secular and the primary effect of the loan of secular textbooks could not be said either to advance or inhibit religion.

We are not persuaded by plaintiffs' argument that *Allen* establishes some sort of child-benefit theory under which direct government aid to church related educational institutions is not permissible, while government aid to students attending such institutions is permissible because government aid to an institution in the form of student subsidies is not direct. Although the challenged statute in *Allen* authorized aid to parochial school students and their parents rather than to the schools themselves, the Court neither held nor suggested that the identity of the direct recipient of the aid was the critical factor in determining the constitutionality of the statute under the establishment clause.[12] Moreover, the child-benefit or indirect-direct aid approach would fashion an unacceptable test based on form rather than substance inasmuch as the "constitutional result would depend upon minute distinctions and technicalities." *Lemon* v. *Kurtzman, supra* note 11, at .... (slip opinion at 24). Consequently, we view *Allen* as confirming the secular purpose and primary effect test, rather than a child-benefit test, as controlling with respect to the establishment clause validity of the Act.

12. See also *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), a much earlier decision, in which the Court sustained a federal statute authorizing direct federal aid to a hospital owned and controlled by a corporation composed of members of a monastic order or sisterhood of the Roman Catholic Church.

Lemon v. *Kurtzman, supra* note 11, at .... (slip opinion at 24-25); *Vermont Educational Buildings Financing Agency* v. *Mann, supra* note 11, at 270-71.

Applying the secular purpose and primary effect test to the Act here in question, we find that it clearly meets the first requirement of a secular legislative purpose. The purpose of the Act appears on its face. It contains a congressional declaration that the policy underlying the Act is to increase the student enrollment capacity of the Nation's institutions of higher education through grants for construction of academic facilities to help provide young people with the greatest possible opportunity for higher education; and such declaration is based on congressional findings that there is an urgent need for construction of such facilities to enable these institutions to accommodate anticipated increase in student enrollments.[13] These findings are based on evidence before Congress of the great need for expansion of educational facilities; and of the high proportion of private, including church related, colleges and universities available for such expansion.

13. The Act's statement of congressional findings and declaration of policy reads as follows (20 U.S.C. §701 (1964)):

> "The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities."

There was ample rational basis in the evidence before Congress for such findings. We do not believe it to be within our competence to question such findings. *United States* v. *Gainey*, 380 U.S. 63, 66-68 (1965); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964); *Tot* v. *United States*, 319 U.S. 463, 466 (1943). We hold, based on Congress' declaration of policy and findings, that the Act has the secular purpose of increasing the student enrollment capacity of the Nation's institutions of higher education —an existing urgent public need—and that the Act does not have the purpose of promoting religion of any kind.

The Act also meets the second requirement of a primary effect that neither advances nor inhibits religion. The focus of this test as applied in *Allen* is the function, secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid.[14] In *Allen*, the Court noted that it long had recognized that church related educational institutions pursue two goals: secular education and religious instruction. 392 U.S. at 245-48.

The history of church related educational institutions in this Country reflects this dual function. Legislative, judicial, and prevailing social attitudes demonstrate beyond question that church related educational institutions play a large and vital role in providing secular education. Legis-

14. In *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, 220 A.2d 51, *cert. denied, appeal dismissed*, 385 U.S. 97 (1966), the Maryland Court of Appeals held that the constitutionality of direct construction grants under the establishment clause depended on whether the recipient institution was "sectarian". We believe this holding is inconsistent with the controlling *Allen* secular purpose and primary effect test.

lative and judicial determinations have long established that a state's interest in secular education does not require that all children attend publicly operated schools; attendance at church related schools satisfies state compulsory education laws provided the schools meet state secular education requirements. The Supreme Court summarized in *Allen, supra,* at 247-48, from the standpoint of the constitutional standard applied in that case, the relationship of the sectarian function to the secular education function of private schools, including parochial schools:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

The Act before us was carefully drafted to insure that grants made to church related educational institutions would subsidize the secular rather than the religious functions of such institutions. It authorizes grants only for the

construction of academic facilities to be used for secular purposes; and specifically prohibits grants for the construction of any facility to be used for religious instruction or worship.[15] In addition, there are other provisions of the Act and administrative regulations which insure that facilities constructed with federal grants are and will be used only for secular purposes.[16] We hold that the Act has a primary effect that neither advances nor inhibits religion.

For the reasons stated above, we conclude that plaintiffs' claim that the Act and grants to defendant colleges and universities for construction of academic facilities impair their rights under the establishment clause is without merit.

FREE EXERCISE CLAUSE CLAIM

Plaintiffs also claim that the Act and grants impair their rights under the free exercise clause on the ground that they effect compulsory taxation for religious purposes.

Since the Act has a secular legislative purpose and a primary effect which neither advances nor inhibits religion, it cannot be said to effect taxation for religious purposes. Moreover, a legislative enactment does not abridge the free exercise clause unless it has a coercive effect on an individual in the practice of his religion. Plaintiffs have not shown that the Act coerces them as individuals in the practice of their religion in any way. *Allen, supra,* at 248-49;

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15. 20 U.S.C. §751(a)(2) (1964).

16. 20 U.S.C. §754 (1964); 45 C.F.R. §170.14 (1969); Plaintiffs' Exhibits 125 and 126.

Schempp, supra, at 223; *Lemon, supra,* at —— (slip opinion at 25-27). Therefore, plaintiffs' free exercise claim is without merit.

We are mindful of the centuries of human struggle that culminated in the sixteen cryptic words which constitute the establishment and free exercise clauses of the First Amendment; and we have profound respect for the framers of the Bill of Rights and their determination to erect a wall between church and state which must be kept high and impregnable.[17]

We also recognize the strong national policy of providing higher education for the burgeoning numbers of young men and women who aspire to and are qualified for a higher education.[18] Providing such education may well be critical to the survival of this Nation.

It would be ironic indeed if this Act of Congress, so specifically intended and precisely written to comply with the constitutional standard of a secular legislative purpose and a primary effect that neither advances nor inhibits religion, were to be stricken down in the name of religious freedom. Our careful study of the Act, its legislative history and the entire record before us leaves us with a strong conviction that the Act and the grants do not violate the establishment clause or the free exercise clause of the First Amendment.

In short, here we find no conflict between preservation of religious freedom and provision of higher education. Without both, we may end up with neither.

17. *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1947).

18. See Preamble To Higher Education Facilities Act of 1963, *supra* note 13.

CONCLUSIONS

We hold that:

(1) The Court has jurisdiction over the subject matter and the parties.

(2) The Act authorizes the grants made to defendant colleges and universities for construction of academic facilities.

(3) The Act and grants thereunder do not impair plaintiffs' rights under the establishment clause or the free exercise clause of the First Amendment.

(4) The Act and grants thereunder do not discriminate against non-sectarian institutions by depriving them of federal funds in violation of the First and Fourteenth Amendments.

(5) Plaintiffs are not entitled to injunctive relief against defendants.

(6) Defendants are entitled to judgment dismissing the complaint, but without costs.

This opinion, together with the separately stated Findings of Fact and Conclusions of Law filed herewith, constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

Defendants' motions to dismiss, which were made at the close of plaintiffs' opening statement and at the close of plaintiffs' case, are denied. Various motions to strike evidence upon which the Court reserved decision, are de-

nied insofar as they are directed at evidence which supports the Court's findings of fact and conclusions of law; in all other respects, the motions are dismissed as moot.

Dated at Hartford, Connecticut, this 19th day of March, 1970.

J. JOSEPH SMITH

J. JOSEPH SMITH
United States Circuit Judge

WILLIAM H. TIMBERS

WILLIAM H. TIMBERS
United States District Judge

M. JOSEPH BLUMENFELD

M. JOSEPH BLUMENFELD
United States District Judge

Appendix B

Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 12,767

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON,

Plaintiffs,

vs.

ROBERT H. FINCH, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE,

Defendants.

The Court, after full hearing, makes the following Findings of Fact and Conclusions of Law which, together with the Court's opinion filed herewith, constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

FINDINGS OF FACT

(A) The Parties

(1) Plaintiffs are fifteen residents and citizens of the United States and of Connecticut; they are federal taxpayers suing for themselves and others similarly situated; and as taxpayers they have standing to sue.

(2) Defendant Robert H. Finch is Secretary of the Department of Health, Education and Welfare of the United States; in that capacity he has executive responsibility for the operation of federal programs relating to education.

(3) Defendant James E. Allen, Jr. is Commissioner of Education for the United States (Commissioner); in that capacity he is in charge of the Office of Education of the United States (Office of Education), which administers and supervises various federal programs relating to education and assistance thereof.

(4) Defendant Marvin K. Peterson is Chairman of the Connecticut Commission on Aid to Higher Education (Connecticut Commission), which was created to implement the State's participation in the Higher Education Facilities Act of 1963, 20 U.S.C. §§701-58 (1964) (the Act).

(5) Defendant Sacred Heart University is a coeducational liberal arts university located in Fairfield, Connecticut.

(6) Defendant Annhurst College is a liberal arts college for women located in Woodstock, Connecticut.

(7) Defendant Fairfield University is a liberal arts university for men located in Fairfield, Connecticut.

(8) Defendant Albertus Magnus College is a liberal arts college for women located in New Haven, Connecticut.

(B) Statutory Scheme

(9) In 1963, Congress enacted the Higher Education Facilities Act. Title I of the Act (Title I), 20 U.S.C. §§701-21 (1964), authorizes grants of federal funds to institutions of higher education for construction of undergraduate academic facilities.

(10) An institution of higher education is eligible for a Title I grant for construction of an academic facility only if construction of such facility will result in an urgently needed substantial expansion of the institution's student enrollment capacity or of its capacity to carry out one of the other purposes of the Act. 20 U.S.C. §716 (1964).

(11) An "institution of higher education" is defined in the Act as one which:

(a) admits as regular students individuals having a certificate of graduation from a high school, or the recognized equivalent thereof;

(b) is legally authorized within the State to provide a program of education beyond high school;

(c) is a public or other nonprofit institution;

(d) provides an educational program for which it awards a bachelor's degree; or provides not less than a two-year educational program which is ac-

ceptable for full credit toward a degree; or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(3) is accredited by a nationally recognized accrediting agency or association approved for that purpose by the Commission or meets one of the alternatives thereto. 20 U.S.C. §751(f) (1964).

(12) The Act specifically excludes from its definition of academic facilities "any facility used or to be used for sectarian instruction or as a place of religious worship, or * * * any facility which (although not a facility described in the preceding clause), is used or to be used primarily in connection with any part of the program of a school or department of divinity. * * *" 20 U.S.C. §751(a) (2) (1964).

(C) Regulatory Scheme

(13) A State desiring to participate in the Title I grant program must designate a State agency which is broadly representative of the public and of institutions of higher education within the State and must submit to the Commissioner, through that agency, a State plan for participation in the program. 20 U.S.C. §715(a) (1964).

(14) The State of Connecticut designated, as the State agency responsible for administration of the State's re-

sponsibilities under Title I, the Connecticut Commission, which is broadly representative of the public and of institutions of higher education in the State.

(15) In 1964, the Connecticut Commission adopted a State plan for participation in the Title I grant program; the plan was submitted to and approved by the Commissioner; the plan complies with all pertinent provisions of the Act.

(16) The Connecticut Commission receives applications for Title 1 grants from institutions of higher education throughout the State of Connecticut.

(17) In accordance with the procedures of the Connecticut Commission, applications for grants are submitted on forms provided by the Commissioner.

(18) Instructions which accompany applications for use in their preparation and submission emphasize that academic facilities to be used for sectarian instruction, religious worship or primarily in connection with any part of the program of a school or department of divinity are not eligible for grants; in each application the institution applying for a grant gives certain assurances, including assurances that no part of the areas included in the proposed project will be used for such proscribed purposes.

(19) The Connecticut Commission employs a staff which reviews the applications to determine whether they meet various statutory criteria of eligibility, the requirements of the Commissioner and the requirements of the State plan adopted by the Connecticut Commission.

(20) Applications which are found to meet the statutory criteria of eligibility are then evaluated by the Connecticut Commission with respect to several factors contained in the State plan to determine the relative priorities of eligible projects for proper allocation of federal funds available to Connecticut in a particular fiscal year. The setting of relative priorities among eligible projects is specifically required by the Act. 20 U.S.C. §717(a) (1964). The factors taken into account by the Connecticut Commission in setting the relative priorities are the projected future enrollment increases at an institution (both numerical and percentage); the institution's projected increase in facilities (both numerical and percentage); and the institution's utilization of facilities (which is determined according to a capacity/enrollment ratio, average weekly use of classrooms and average weekly use of laboratories). Consideration of these factors is intended to assure that the limited federal funds available for Title I projects will be awarded for those projects for which there is an urgent need consistent with the purposes of the Act.

(21) Based on the procedures described above in paragraphs (16) through (20), the Connecticut Commission decides which projects to recommend for grants and the amounts of the grants to be recommended. The recommendations of the Connecticut Commission are forwarded to the Commissioner for further review.

(22) The Office of Education maintains a staff which reviews the recommendations for grants from several state agencies. The Office of Education seeks to assure itself that the applicant has complied with all applicable provisions of the Act and regulations promulgated thereunder,

including the requirement that no eligible portion of a federally funded facility be used for religious worship or sectarian instruction or in connection with the program of a school or department of divinity.

(23) A grant under Title I is not approved unless the Office of Education is satisfied on the basis of its review of each application that the provisions of the Act and the regulations have been complied with. Where necessary or appropriate to the making of this determination, other information supplied by an applicant or otherwise available to the Office of Education is also taken into consideration.

(24) Successful applicants, upon being notified directly by the Office of Education that their grants have been approved, then execute a "Grant Agreement" which signifies their acceptance of the federal financial assistance.

(25) Thereafter, before grant funds may be disbursed, the following steps must be taken:

(a) Final working drawings and specifications of the funded facility must be submitted to and approved by the Commissioner.

(b) Standard "Terms and Conditions", incorporated into all grant agreements, must be satisfied.

(D) The Grants

(26) Sacred Heart University submitted an application to the Connecticut Commission for a Title I grant for construction of a new library.

(27) Annhurst College submitted an application to the Connecticut Commission for a Title I grant for construc-

tion of a new music, drama and arts building with an auditorium to be used for general academic programs.

(28) Fairfield University submitted an application to the Connecticut Commission for a Title I grant for construction of a new library building.

(29) Fairfield University also submitted an application to the Connecticut Commission for a Title I grant for construction of a new science building to house the biology, chemistry, mathematics and physics departments, the computer instructional and research division and some biology-related functions of the psychology department; the grant requested was for construction of the science building minus the computer facilities.

(30) Albertus Magnus College submitted an application to the Connecticut Commission for a Title I grant for construction of academic facilities to be located in a general academic building containing classrooms, faculty and administrative offices, faculty seminar room, student study area, language laboratories and adjoining offices and necessary related service and maintenance facilities; the grant was requested for construction of tw olanguage laboratories and adjoining offices and necessary related service facility in the general academic building.

(31) Each of these applications affirmatively demonstrated that the grant for which application was made would result in an urgently needed substantial expansion of the institution's student enrollment capacity and would be used solely for construction of secular academic facilities.

(32) Each of these applications affirmatively demonstrated that the grant for which application was made would be used only for construction of the facility specified therein; and that no part of any funds granted would be used to defray any part of the cost of any facility used or to be used for sectarian instruction or as a place for religious worship, or for any facility used or to be used primarily in connection with any part of the program of a school or department of divinity.

(33) The Connecticut Commission properly recommended each of these applications and transmitted them to the Office of Education which in turn properly approved each of them.

(34) Sacred Heart University has been the recipient of a Title I grant in amount of $367,100 for construction of a library which has been completed.

(35) The Sacred Heart University Library opened in November, 1968. The University presented evidence that no classes have been conducted in the library; that no restrictions have been imposed on the books that may be acquired for the library; that no religious worship or services have been conducted in the library; and that there are no religious symbols or plaques in or on the library. Plaintiffs presented no evidence to the contrary. The Sacred Heart University Library, and the federal funds which assisted its construction, have been used solely for non-religious purposes.

(36) Annhurst College has been the recipient of a Title I grant in amount of $444,182 for construction of a fine arts

building with an auditorium which is currently under construction.

(37) The Annhurst College Fine Arts Building was scheduled for occupancy sometime after January, 1970. The College presented evidence that the building will be used for courses in music, art and drama; that no religious worship or services will be conducted in the building; and that there will be no religious symbols or plaques in or on the building. Plaintiffs presented no evidence to the contrary. The Annhurst College Fine Arts Building, and the federal funds which are assisting its construction, will be used solely for non-religious purposes.

(38) Fairfield University has been the recipient of two Title I grants. The first was in amount of $500,000 for construction of a library which has been completed. The second was in amount of $537,500 for construction of a science building which is currently under construction.

(39) The Fairfield University Library opened in September, 1968. The University presented evidence that the library has been used only for the purposes stated in its grant application; that no restrictions have been imposed on the books that may be acquired for the library; that no classes have been conducted in the library; that no religious worship or services have been conducted in the library; and that there are no religious symbols or plaques in or on the library. Plaintiffs presented no evidence to the contrary. The Fairfield University Library, and the federal funds which assisted its construction, have been used solely for non-religious purposes.

(40) The Fairfield University Science Building, which was under construction at the time of trial, is scheduled to be completed in February, 1971. The University has represented to the federal government that the building will house its physics, chemistry, mathematics and biology departments, a portion of its psychology department, and a computer center. The University presented evidence that no limitations, religious or otherwise, will be imposed on the content of the courses that will be taught in the new building; that no religious worship or services will be conducted in the building; and that there will be no religious symbols or plaques in or on the building. Plaintiffs presented no evidence to the contrary. The Fairfield University Science Building, and the federal funds which are assisting its construction, will be used solely for non-religious purposes.

(41) Albertus Magnus College has been the recipient of a Title I grant in amount of approximately $21,000 for construction of a language laboratory which has been completed.

(42) The Albertus Magnus College Language Laboratory became operational in 1966. It has been used by students in modern foreign language courses as a means of improving their pronunciation. The College presented evidence that the language laboratory has been used for no purpose other than to assist students in improving their pronunciation; that the language laboratory has been used only for the purposes stated in the grant application; that no religious worship or services have been conducted in the language laboratory, and that there are no religious symbols or plaques in or on the language laboratory.

Plaintiffs presented no evidence to the contrary. The Albertus Magnus College Language Laboratory, and the federal funds which assisted its construction, have been used solely for non-religious purposes.

CONCLUSIONS OF LAW

(1) The Court has jurisdiction over the subject matter and the parties.

(2) This action is an adversary one presenting a justiciable controversy between the parties.

(3) Plaintiffs as federal taxpayers are properly representative of the class on behalf of which they sue and have standing to maintain this action.

(4) Defendant government officials are the principal persons charged with the responsibilities, state and federal, of administering the Act.

(5) Defendant church related colleges and universities are recipients under the Act of grants for construction of academic facilities.

(6) In compliance with the Act and regulations promulgated thereunder, each of the grants in question has been properly approved by the Office of Education of the United States, following proper recommendation by the Connecticut Commission on Aid to Higher Education, such approvals and recommendations having been based upon applications affirmatively demonstrating that the grant in each instance would result in an urgently needed substantial expansion of the institution's student enrollment capacity and would be used solely for construction of secular academic facilities.

(7) The Act authorizes the grants made to defendant colleges and universities for construction of academic facilities.

(8) The Act and grants thereunder do not impair plaintiffs' rights under the establishment clause or the free exercise clause of the First Amendment.

(9) The Act and grants thereunder do not discriminate against non-sectarian institutions by depriving them of federal funds in violation of the First and Fourteenth Amendments.

(10) Plaintiffs are not entitled to injunctive relief against defendants.

(11) Defendants are entitled to judgment dismissing the complaint on the merits.

(12) No costs shall be taxed against any party to this action.

Dated at Hartford, Connecticut, this 19th day of March, 1970.

J. JOSEPH SMITH

J. JOSEPH SMITH
United States Circuit Judge

WILLIAM H. TIMBERS

WILLIAM H. TIMBERS
United States District Judge

M. JOSEPH BLUMENFELD

M. JOSEPH BLUMENFELD
United States District Judge

Appendix C

Excerpts from Public Law 88-204, 77 Stat. 363-9

AN ACT

To authorize assistance to public and other nonprofit institutions of higher education in financing the construction, rehabilitation, or improvement of needed academic and related facilities in undergraduate and graduate institutions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Higher Education Facilities Act of 1963".

Findings and Declaration of Policy

Sec. 2. The Congress hereby finds that the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities.

TITLE I—GRANTS FOR CONSTRUCTION OF UNDERGRADUATE ACADEMIC FACILITIES

Appropriations Authorized

Sec. 101. (a) The Commissioner of Education (hereinafter in this Act referred to as the "Commissioner") shall carry out during the fiscal year ending June 30, 1964, and each of the four succeeding fiscal years, a program of grants to institutions of higher education for the construction of academic facilities in accordance with this title.

(b) For the purpose of making grants under this title, there is hereby authorized to be appropriate the sum of $230,000,000 for the fiscal year ending June 30, 1964, and each of the two succeeding fiscal years; but for the fiscal year ending June 30, 1967, and the succeeding fiscal year, only such sums may be appropriated as the Congress may hereafter authorize by law. In addition to the sums authorized to be appropriated under the preceding sentence, there is hereby authorized to be appropriated for the fiscal year ending June 30, 1965, and the succeeding fiscal year, for making such grants the difference (if any) between the sums authorized to be appropriated under the preceding sentence for preceding fiscal years and the aggregate of the sums which were appropriated for such preceding years under such sentence.

(c) Sums appropriated pursuant to subsection (b) of this section shall remain available for reservation as provided in section 109 until the close of the fiscal year next succeeding the fiscal year for which they were appropriated.

ALLOTMENTS

SEC. 102. Of the funds appropriated pursuant to section 101 for any fiscal year, 22 per centum shall be allotted among the States in the manner prescribed by section 103 for use in providing academic facilities for public community colleges and public technical institutes. The remainder of the funds so appropriated shall be allotted among the States in the manner as prescribed in section 104 for use in providing academic facilities for institutions of higher education other than public community colleges and public technical institutes.

ALLOTMENTS TO STATES FOR PUBLIC COMMUNITY COLLEGES AND PUBLIC TECHNICAL INSTITUTES

SEC. 103.(a) The funds to be alloted for any fiscal year for use in providing academic facilities for public community colleges and public technical institutes shall be allotted among the States on the basis of the income per person and the number of high school graduates of the respective States. Such allotments shall be made as follows: The Commissioner shall allot to each State for each fiscal year an amount which bears the same ratio to the funds being allotted as the product of—

(1) the number of high school graduates of the State, and

(2) the State's allotment ratio (as determined under subsection (d))

bears to the sum of the corresponding products for all the States.

(b) The amount of each allotment to a State under this section shall be available, in accordance with the provisions of this title, for payment of the Federal share (as determined under sections 108(b) (3) and 401(d) of the development cost of approved projects for the construction of academic facilities within such State for public community colleges and public technical institutes. Sums allotted to a State for the fiscal year ending June 30, 1964, shall remain available for reservation as provided in section 109 until the close of the next fiscal year, in addition to the sums allotted to such State for such next fiscal year.

(c) All amounts allotted under this section for the fiscal year ending June 30, 1965, and the succeeding fiscal year, which are not reserved as provided in section 109 by the close of the fiscal year for which they are allotted, shall be reallotted by the Commissioner, on the basis of such factors as he determines to be equitable and reasonable, among the States which, as determined by the Commissioner, are able to use without delay any amounts so reallotted for providing academic facilities for public community colleges or public technical institutes. Amounts reallotted under this subsection shall be available for reservation until the close of the fiscal year next succeeding the fiscal year for which they were originally allotted.

(d) For purposes of this section—

'1) The "allotment ratio" for any State shall be 1.00 less the product of (A) .50 and (B) the quotient obtained by dividing the income per person for the State by the income per person for all the States (not including Puerto Rico, the Virgin Islands, American Samoa, and Guam), except that (i) the allotment ratio

shall in no case be less than .33⅓ or more than .66⅔, (ii) the allotment ratio for Puerto Rico, the Virgin Islands, American Samoa, and Guam shall be .66⅔, and (iii) the allotment ratio of any State shell be .50 for any fiscal year if the Commissioner finds that the cost of school construction in such State exceeds twice the median of such costs in all the States as determined by him on the basis of an index of the average per pupil cost of constructing minimum school facilities in the States as determined for such fiscal year under section 15(6) of the Act of September 23, 1950, as amended (20 U.S.C. 645), or, in the Commissioner's discretion, on the basis of such index and such other statistics and data as the Commissioner shall deem adequate and appropriate; and

(2) The allotment ratios shall be promulgated by the Commissioner as soon as possible after enactment of this Act, and annually thereafter, on the basis of the average of the incomes per person of the State and of all the States for the three most recent consecutive calendar years for which satisfactory data are available from the Department of Commerce.

(3) The term "high school graduate" means a person who has received formal recognition (by diploma, certificate, or similar means) from an approved school for successful completion of four years of education beyond the first eight years of schoolwork, or for demonstration of equivalent achievement. For the purposes of this section the number of high school graduates shall be limited to the number who graduated in the most recent school year for which satisfactory data are available from the Department of Health, Education, and Welfare. The interpretation of the definition of "high school graduate" shall fall within the authority of the Commissioner.

ALLOTMENTS TO STATES FOR INSTITUTIONS OF HIGHER EDUCATION OTHER THAN PUBLIC COMMUNITY COLLEGES AND PUBLIC TECHNICAL INSTITUTES

SEC. 104. (a) Of the funds to be allotted for any fiscal year for use in providing academic facilities for institutions of higher education other than public community colleges and public technical institutes (1) one-half shall be allotted by the Commissioner among the States so that the allotment to each State under this clause will be an amount which bears the same ratio to such one-half as the number of students enrolled in institutions of higher education in such State bears to the total number of students enrolled in such institutions in all the States; and (2) the remaining one-half shall be allotted by him among the States so that the allotment to each State under this clause will be an amount which bears the same ratio to such remainder as the number of students enrolled in grades nine to twelve (both inclusive) of schools in such State bears to the total number of students in such grades in schools in all the States. For the purposes of this subsection, (A) the number of students enrolled in institutions of higher education shall be deemed to be equal to the sum of (i) the number of full-time students and (ii) the full-time equivalent of the number of part-time students as determined by the Commissioner in accordance with regulations; and (B) determinations as to enrollment under either clause (1) or clause (2) of this subsection shall be made by the Commissioner on the basis of data for the most recent year for which satisfactory data with respect to such enrollment are available to him.

(b) The amount of each allotment to a State under this section shall be available, in accordance with the provisions

of this title, for payment of the Federal share (as determined under sections 108(b) (3) and 401(d) of the development cost of approved projects for the construction of academic facilities within such State for institutions of higher education other than public community colleges and public technical institutes. Sums allotted to a State for the fiscal year ending June 30, 1964, shall remain available for reservation as provided in section 109 until the close of the next fiscal year, in addition to the sums allotted to such State for such next fiscal year.

(c) All amounts allotted under this section for the fiscal year ending June 30, 1965, and the succeeding fiscal year, which are not reserved as provided in section 109 by the close of the fiscal year for which they are allotted, shall be reallotted by the Commissioner, on the basis of such factors as he determines to be equitable and reasonable, among the States which, as determined by the Commissioner, are able to use without delay any amounts so reallotted for providing academic facilities for institutions of higher education other than public community colleges and public technical institutes. Amounts reallotted under this subsection shall be available for reservation until the close of the fiscal year next succeeding the fiscal year for which they were originally allotted.

STATE COMMISSIONS AND PLANS

Sec. 105. (a) Any State desiring to participate in the grant program under this title shall designate for that purpose an existing State agency which is broadly representative of the public and of institutions of higher education (including junior colleges and technical institutes) in the

State, or, if no such State agency exists, shall establish such a State agency, and submit to the Commissioner through the agency so designated or established (hereinafter in this title referred to as the "State commission"), a State plan for such participation. The Commissioner shall approve any such plan which—

(1) provides that it shall be administered by the State commission;

(2) sets forth, consistently with basic criteria prescribed by regulation pursuant to section 107, objective standards and methods (A) for determining the relative priorities of eligible projects for the construction of academic facilities submitted by institutions of higher education within the State, and (B) for determining the Federal share of the development cost of each such project other than a project for a public community college or public technical institute (unless such plan provides for a uniform Federal share for all such projects);

(3) provides that the funds allotted (or reallotted) for any year under section 103 will be available only for use for the construction of academic facilities for public community colleges and public technical institutes, and that funds allotted (or reallotted) for any year to the State under section 104 will be available only for use for the construction of academic facilities for institutions of higher education other than public community colleges and public technical institutes;

(4) provides (A) for assigning priorities solely on the basis of such criteria, standards, and methods to eligible projects submitted to the State commission and deemed by it to be otherwise approvable under the provisions of this title; and (B) for approving and recommending to the Commissioner, in the order of

such priority, applications covering such eligible projects, and for certifying to the Commissioner the Federal share, determined by the State commission under the State plan, of the development cost of the project involved;

(5) provides for affording to every applicant, which has submitted to the State commission a project, an opportunity for a fair hearing before the State commission as to the priority assigned to such project or as to any other determination of the State commission adversely affecting such applicant; and

(6) provides (A) for such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of and accounting for Federal funds paid to the State commission under this title, and (B) for the making of such reports, in such form and containing such information, as may be reasonably necessary to enable the Commissioner to perform his functions under this title.

(b) The Commissioner is authorized to expend not exceeding $3,000,000 during each of the first two fiscal years of the program under this title in such amounts as he may consider necessary for the proper and efficient administration of the State plans approved under this title, including expenses which he determines was necessary for the preparation of such plans.

ELIGIBILITY FOR GRANTS

Sec. 106. An institution of higher education shall be eligible for a grant for construction of an academic facility under this title (1) in the case of an institution of higher education other than a public community college or public technical institute, only if such construction is limited to

structures, or portions thereof, especially designed for instruction or research in the natural or physical sciences, mathematics, modern foreign languages, or engineering, or for use as a library, and (2) only if such construction will, either alone or together with other construction to be undertaken within a reasonable time, (A) result in an urgently needed substantial expansion of the institution's student enrollment capacity, or (B) in the case of a new institution of higher education, result in creating urgently needed enrollment capacity.

Basic Criteria for Determining Priorities and Federal Share

Section 107. (a) As soon as practicable after the enactment of this Act the Commissioner shall by regulation prescribe basic criteria to which the provisions of State plans setting forth standards and methods for determining relative priorities of eligible construction projects, and the application of such standards and methods to such projects under such plans, shall be subject. Such basic criteria (1) shall be such as will best tend to achieve the objectives of this title while leaving opportunity and flexibility for the development of State plan standards and methods that will best accommodate the varied needs of institutions in the several States, and (2) shall give special consideration to expansion of undergraduate enrollment capacity. Subject to the foregoing requirements, such regulations may establish additional and appropriate basic criteria, including provision for considering the degree to which applicant institutions are effectively utilizing existing facilities, provision for allowing State plans to group or

provide grouping, in a reasonable manner, facilities or institutions according to functional or educational type for priority purposes, and, in view of the national objectives of this Act, provision for considering the degree to which the institution serves students from two or more States or from outside the United States; and in no event shall an institution's readiness to admit such out-of-State students be considered as a priority factor adverse to such institution.

(b) The Commissioner shall further prescribe by regulation the basic criteria for determining the Federal share of the development cost of any eligible project under this title within a State other than a project for a public community college or public technical institute, to which criteria the applicable standards and methods set forth in the State plan for such State shall conform in the absence of a uniform statewide Federal share specified in or pursuant to such plan. In the case of a project for an institution of higher education other than a public community college or public technical institute, the Federal share shall in no event exceed 33⅓ per centum of its development cost; and in the case of a project for a public community college or public technical institute, the Federal share shall be 40 per centum of its development cost.

(c) Section 4 of the Administrative Procedure Act shall apply to the prescription of regulations under this section, notwithstanding the provisions of clause (2) thereof.

APPLICATIONS FOR GRANTS AND CONDITIONS FOR APPROVAL

Sec. 108. (a) Institutions of higher education which desire to obtain grants under this title shall submit applications therefor at such time or times and in such manner as may be prescribed by the Commissioner, and such applications shall contain such information as may be required by or pursuant to regulation for the purpose of enabling the Commissioner to make the determinations required to be made by him under this title.

(b) The Commissioner shall approve an application covering a project for construction of an academic facility and meeting the requirements prescribed pursuant to subsection (a) if—

(1) the project is an eligible project as determined under section 196;

(2) the project has been approved and recommended by the appropriate State commission;

(3) the State commission has certified to the Commissioner, in accordance with the State plan, the Federal share of the development cost of the project, and sufficient funds to pay such Federal share are available from the applicable allotment of the State (including any applicable reallotment to the State);

(4) the project has, pursuant to the State plan, been assigned a priority that is higher than that of all other projects within such State (chargeable to the same allotment) which meet all the requirements of this section (other than this clause) and for which Federal funds have not yet been reserved;

(5) the Commissioner determines that the construction will be undertaken in an economical manner and will not be of elaborate or extravagant design or materials; and

(6) the Commissioner determines that (in addition to the assurance required by section 403 and such assurance as to title to the site as he may deem necessary) the application contains or is supported by satisfactory assurances—

(A) that Federal funds received by the applicant will be used solely for defraying the development cost of the project covered by such application,

(B) that sufficient funds will be available to meet the non-Federal portion of such cost and to provide for the effective use of the academic facility upon completion, and

(C) that the facility will be used as an academic facility during at least the period of the Federal interest therein (as defined in section 404).

(c) Amendments of applications shall, except as the Commissioner may otherwise provide by or pursuant to regulation, be subject to approval in the same manner as original applications.

AMOUNT OF GRANT—PAYMENT

SEC. 109. Upon his approval of any application for a grant under this title, the Commissioner shall reserve from the applicable allotment (including any applicable reallotment) available therefor, the amount of such grant, which (subject to the limits of such allotment or reallotment) shall be equal to the Federal share (ascertained by him under section 108(b)(3) of the development cost of the project covered by such application. The Commissioner shall pay such reserved amount, in advance or by way of reimbursement, and in such installments consistent with construction progress, as he may determine. The Commissioner's res-

ervation of any amount under this section may be amended by him, either upon approval of an amendment of the application covering such project or upon revision of the estimated development cost of a project with respect to which such reservation was made, and in the event of an upward revision of such estimated cost approved by him he may reserve the Federal share of the added cost only from the applicable allotment (or reallotment) available at the time of such approval.

ADMINISTRATION OF STATE PLANS

Sec. 110. (a) The Commissioner shall not finally disapprove any State plan submitted under this title, or any modification thereof, without first affording the State commission submitting the plan reasonable notice and opportunity for a hearing.

(b) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State Commission administering a State plan approved under this title, finds—

(1) that the State plan has been so changed that it no longer complies with the provisions of section 105(a), or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision,

the Commissioner shall notify such State commission that the State will not be regarded as eligible to participate in the program under this title until he is satisfied that there is no longer any such failure to comply.

JUDICIAL REVIEW

Sec. 111. (a) If any State is dissatisfied with the Commissioner's final action with respect to the approval of its State plan submitted under section 105(a) or with his final action under section 110(b), such State may appeal to the United States court of appeals for the circuit in which such State is located. The summons and notice of appeal may be served at any place in the United States. The Commissioner shall forthwith certify and file in the court the transcript of the proceedings and the record on which he based his action.

(b) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the transcript and record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) The court shall have jurisdiction to affirm the action of the Commissioner or to set aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254.

MEMORANDUM

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1555

ELEANOR TAFT TILTON, ET AL., APPELLANTS

v.

ROBERT H. FINCH, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, JAMES E. ALLEN, JR., COMMISSIONER OF EDUCATION OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MEMORANDUM FOR APPELLEES FINCH AND ALLEN

In this case, a three-judge district court convened pursuant to 28 U.S.C. 2282 and 2284 sustained the constitutionality of Title I of the Higher Education Facilities Act of 1963 (20 U.S.C. 701 *et seq.*). The Act authorizes grants to institutions of higher education for the construction of academic facilities (20 U.S.C. 711). While the Act prohibits grants for the construction of facilities to be used for sectarian in-

struction or religious worship (20 U.S.C. 751(a)(2)), the legislative history indicates that grants for sectarian institutions performing secular educational functions were contemplated (see J.S. 19).

The appellants brought this suit to enjoin the use of Title I funds to finance the construction of secular academic facilities at sectarian educational institutions and for a declaratory judgment that such use of Title I funds is unauthorized by the statute or, if authorized, is unconstitutional under the First Amendment. After a hearing, the district court dismissed the complaint on the merits, relying heavily on *Board of Education* v. *Allen*, 392 U.S. 236.

While we believe the decision of the district court to be correct, we agree that it presents important and recurring questions concerning the scope and application of the *Allen* decision and this Court's more recent decision in *Walz* v. *Tax Commission*, No. 135, this Term, decided May 4, 1970. The New York statute sustained in *Allen* required local school boards to lend textbooks to children in public or private (including sectarian) schools, under safeguards designed to insure that the books loaned were "not unsuitable for use in the public schools because of religious content." 392 U.S. at 245. Other federal and State statutes make different forms of aid available to sectarian schools, under varying arrangements for the exercise of public control to assure secular use of the funds.

This Court has recently noted probable jurisdiction in a case involving the validity of one such State statute. *Lemon* v. *Kurtzman*, No. 1189, this Term,

probable jurisdiction noted April 20, 1970. *Lemon* involves a Pennsylvania statute authorizing the use of public funds to reimburse private (including sectarian) schools for "secular educational services." The Pennsylvania Act allows payment for teacher salaries, textbooks and instructional materials, to the extent that these expenses are incurred for the teaching of mathematics, modern foreign languages, physical science, or physical education.

We believe that since plenary review has been granted in *Lemon*, it would be appropriate for this Court to review the instant case as well. Whereas *Allen* involved textbooks, the *Lemon* statute involves teachers' salaries and the instant case the construction of school buildings. Moreover, unlike *Allen* and *Lemon*, the instant case involves aid only to institutions of higher education. Adjudication of the *Lemon* case and instant case together would enable the Court to provide needed clarification of the extent to which, and the conditions under which, the Constitution permits public funds to be used to assist sectarian educational institutions.

Accordingly, we suggest that probable jurisdiction be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1970.

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